

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 2627 of 1999

For Approval and Signature:

Hon'ble MR.JUSTICE R.BALIA. and
MR.JUSTICE A.R.DAVE

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
 2. To be referred to the Reporter or not?
 3. Whether Their Lordships wish to see the fair copy of the judgement?
 4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
 5. Whether it is to be circulated to the Civil Judge?

DARSHAN TEXTILES

Versus

JOINT COMMISSIONER OF INCOME TAX (ASSESSMENT)

Appearance:

MR SN SOPARKAR for Petitioner
MR MANISH R BHATT for Respondent No. 1

CORAM : MR.JUSTICE R.BALIA. and
MR.JUSTICE A.R.DAVE

Date of decision: 03/05/99

ORAL JUDGEMENT

#. Rule. Service of Rule is waived by learned counsel for the respondent. Heard.

#. This Special Civil Application has arisen in peculiar facts and circumstances. Petitioner is a registered firm

and is an entity under the Income Tax Act liable to be assessed as a registered firm. For the assessment year 1986-87 the petitioner was assessed to a income of Rs.69,86,200/- by the assessing officer on 31.3.89 which included an addition in the sum of Rs.36,43,584/- under section 43B of the Income Tax Act 1961, as an unpaid Excise Duty. It is this addition and its subsequent dealing under Section 43B are subject matter of issue in this case. The assessee's case had been that he is not liable to pay Excise Duty, but M/s. Uma Textiles, a sister concern was liable to pay Excise Duty hence Section 43B did not apply in his case and at any rate he has paid the sum to said Uma Textile, who was responsible for making payment to Government and has thus discharged his obligation.

#. On appeal before CIT (Appeals) vide his order dated 28.12.1989 this claim of the assessee was upheld. Before CIT (Appeals) a certificate has been produced by M/s. Uma Textiles in which it was stated that it has collected the sum from Darshan Textiles and paid to the department before due date. CIT (Appeals) apart from noticing above fact also found that the liability of payment of Excise Duty was not of the assessee firm, but it is liability of M/s. Uma Textiles, who was manufacturing/processing the case. He therefore deleted the addition of amount described unpaid excise duty.

#. In respect of this relief given to the assessee along with two other reliefs relating to addition made on account of purchases made during previous year but accounted for in the current year as well as assessee's claim to depreciation under section 32(1A) the revenue appealed before Income Tax Appellate Tribunal. The assessee had also appealed before the Income Tax Appellate Tribunal to the extent he was unsuccessful before CIT (Appeals). By its order dated 30.11.1994, appeal of the assessee was rejected. The Department's appeal was allowed, and the case was remitted to Assessing Officer for deciding some issues afresh. In respect of relief given to the assessee against addition of purchases made in the previous relevant assessment year 1985-86 and depreciation claim under Section 32(1A) the matter was sent back to the Income Tax Officer for deciding the issues de novo. On plea under Section 43B the Tribunal was of the view that the CIT (Appeals) ought not to have acted on evidence of payment to Uma Textiles produced before it for the first time and restored the addition. However, the three conclusions were recorded as follows:

(i) About deletion of purchases made in previous year relevant to 1985-86, the Tribunal said:

"Under the circumstances we deem it fit to restore this matter to the file of the Income Tax Officer."

(ii) About the additions made on account of unpaid excise duty the Tribunal's order read:

"We accordingly reverse his finding and restore that of the Income Tax Officer"

(iii) About the question relating to depreciation under Section 32(1A) the order read:

"Issue is also restores to the file of Income Tax Officer"

#. It appears that because of the use of word 'restored' in all the three findings, the assessee as well as the Income Tax Officer laboured under a mistake that all the questions have been sent back by the Tribunal to the Income Tax Officer for deciding the finding afresh.

#. The assessing officer on 7.2.95 issued a notice of hearing of reassessment proceedings for assessment year 1986-87, set aside by Income Tax Appellate Tribunal, Ahmedabad, stating that the learned Income Tax Appellate Tribunal, Ahmedabad Bench A has set aside the assessment order with a direction to fresh assessment after giving adequate opportunity to the assessee. He required the assessee to state his case amongst other thing about unpaid central Excise Duty to the tune of Rs.36,43,584/also. The assessee made his submissions on the basis of which a fresh order under Section 143(3) read with 250 was framed, on 18.12.1995, and he recorded his finding in the following terms:

"I have gone through the submissions as well as the copy of assessment order of M/s. Uma Textile for A.Y.1986-87 and find that the assessing officer in the case of M/s. Uma Textile has discussed in detail about the Central Excise liability. He has also discussed that the Excise Authorities have permitted under Rule 173 N of Central Excise Rules 1944 that the assessee firm naming M/s. Darshan Textile is operating under the licence given to M/s. Uma Textile with the condition that such goods/job work liability pay

Excise duty shall be squarely upon M/s. Uma Textile. On this basis addition with regard to unpaid excise duty was made in the case of Uma Textile. Since the liability with regard to Excise duty on the cloth processed of the assessee firm naming M/s. Darshan Textile rests on M/s. Uma Textile and action u/s 43B has already been taken in the case of M/s. Uma Textile in the year under consideration, therefore further addition in the case of assessee cannot be made. Considering the above position, addition made of Rs.36,43,584/- is not made in the case of the assessee firm."

#. Somewhere in 1998, the assessee realising the mistake that the Income Tax Appellate Tribunal has in fact had not remanded the issue relating to unpaid excise duty but has reversed the finding of CIT (Appeals) and two contradictory orders exist relating to claim of assessee in respect of the disputed sum applied for rectification of order of Income Tax Appellate Tribunal dated 30.11.1994 which has been rejected by the Tribunal, vide its order dated 30.11.1998, pursuant to which now the assessing officer has issued a notice under Section 154 for making addition of the said unpaid excise duty amount in the assessment for Assessment Year 1986-87.

#. Under these circumstances, apart from challenging the notice under Section 154 dated 15.2.99 and the order of the Income Tax Appellate Tribunal under 254(2) dated 30.11.98, the petitioner challenges the order of the Income Tax Appellate Tribunal dated 30.11.1994.

#. Ordinarily, the challenge is to order dated 30.11.1994 is belated one and there was also available an alternative remedy to the assessee for challenging the finding about sustaining the addition made on account of alleged unpaid excise duty. However we are of the opinion in the background of facts and circumstances noticed above that it appears to be a case because of the use of word 'restored' in respect of all the three findings the assessing officer as well as assessee had acting under a mistake that as the departmental appeal has been allowed which has been restored to the file of Income Tax officer the restoration was total in respect of all issues raised by revenue and not in respect of two issues only. Acting on that mistake further proceedings have taken place way back in 1995 which has culminated in favour of the petitioner. Apparently realising the inconsistent finding existing on record one of the superior Tribunal and another of the inferior Tribunal,

affecting the assessee adversely, he first approached the Tribunal for getting relief. Having failed, the assessee has approached this court to invoke its extraordinary jurisdiction.

##. In the facts and circumstances, we are of the opinion that this is a fit case notwithstanding the order under challenge being of 1994 and there having been available alternative remedy at the relevant time the interest of justice requires that we invoke extraordinary jurisdiction to intervene and examine the issue on merit.

##. We have no hesitation in holding at this stage that unless the finding of the Tribunal in reversing the finding of CIT (Appeals) as to the additions made on account of unpaid Excise Duty under Section 43B of the Act is set aside the Income Tax Officer was justified in issuing notice under Section 154 for the purpose of bringing assessment made in pursuance of direction of the Tribunal in conformity with that order by resorting to rectification proceedings.

##. Thus principal contention remains about validity of applicability of Section 43B to the assessee in respect of unpaid Excise Duty in question. This must depend on finding whether assessee was liable to pay the Excise Duty. This called for examining the finding of CIT (Appeals) that the assessee was not liable to pay Excise Duty, which has consequence bearing on the claim of the assessee to deduction.

##. However, while considering the order of Income Tax Appellate Tribunal dated 30.11.94 we notice that while the Tribunal has taken notice of the fact that the proof of actual payment of excise duty to the Government by Uma Textiles produced for the first time before CIT (Appeals) was not reliable, it has failed to take notice of the principal ground which weighed with the the CIT (Appeals) in accepting the assessee's plea that payment of excise duty to the Central Government was not liability of the assessee but was of Uma Textiles, and therefore provisions of Section 43B will not apply in the case of the petitioner.

##. The relevant part of Section 43B as it was in force during the relevant assessment year reads as under:

"Sec.43B. Notwithstanding anything contained in any other provision of this Act, a deduction

otherwise allowable under this Act in respect of any sum payable by the assessee by way of tax, duty, cess or fee, by whatever name called, under any law for the time being in force shall be allowed (irrespective of the previous year in which the liability to pay such sum was incurred by the assessee according to the method of accounting regularly employed by him) only in computing the income referred to in section 28 of that previous year in which such sum is actually paid by him."

##. The perusal of the aforesaid clause reveals that it governs any sum payable by the assessee by way of tax that is to say the assessee must be subjected to liability of tax under the relevant enactment in respect of which deduction is claimed by the assessee. If the assessee himself is not liable to pay such tax, the fact that he is liable to reimburse to a person who is made responsible for such liability under the relevant statute, will not attract the provisions. In such event the amount outstanding to Government is not a tax due from the assessee in question, but tax is due from the person who is the subject of such tax. One test is whether such sum is recoverable from the assessee claiming deduction as tax under the relevant Statute by treating him person from whom such tax is payable. In case the assessee is not a person liable under the relevant taxing statute, but he incurs liability as part of his purchase price, though separately shown, as tax, it becomes his trading expense liable to be treated on the basis of method of accounting regularly employed by him.

##. Section 43B cannot invoked for denying an assessee reduction of such sum which he incurs by way of expenses merely because a person liable to pay such tax has failed to discharge his duty. Ordinarily, under the Central Excise Act an excise duty is payable by a person who is manufacturer or processor amounting to manufacture and is made responsible to pay such duty to the State. We have noticed above that CIT (Appeals) had found in his order that liability to pay central excise in the present case was that of Uma Textiles and not of the assessee. We have also noticed above that though the Tribunal has taken notice and formed its opinion about the factual aspect of the discharge of that liability by payment to the Government by Uma Textile it has not examined at all the question whether the present petitioner was the assessee by whom such excise duty was payable under the Central Excise Act. Nor it has found this fact of

payment of such sum to Uma Textiles to be incorrect. To this extent the order apparently suffers from an error as it was so found by the CIT (Appeals). Again, it is found by the assessing officer as is apparent from the extract of the assessment order dated 18.12.1995, that the liability with regard to excise duty on the processing of the cloth of assessee under the licence in favour of M/s. Uma Textiles was of Uma Textiles and an action under Section 47B is already been taken in the case of said Uma Textiles in the year under consideration. Such finding would entitle the assessee to get his claim of deduction examined irrespective of Section 43B. This aspect raised a mixed question of law and fact inasmuch as it also required considering question of fact as well as, in our opinion the Tribunal ought to have remanded this issue also to the Income Tax Officer for examination. In not doing so, the Tribunal has apparently erred. This mistake being apparent could have been corrected by the Tribunal in exercise of its jurisdiction under Section 254(2) also.

##. We accordingly allow this petition and set aside the order of the Tribunal dated 30.11.1994 to the extent it reverses the finding of CIT (Appeals) and restore that of the Income Tax Officer on ground No.2, arising under the appeal filed by the Income Tax Officer, rejecting claim of assessee by invoking under Section 43B and direct that the Income Tax Officer to examine this issue also in accordance with law.

##. As we find that the Income Tax Officer has in fact examined that issue considering it to be a direction to reexamine all the issues examined by the income Tax Appellate Tribunal in appeal of the Income Tax Officer and has reached its finding in 1995 which has since then has not been challenged, by anyone we do not not examine the validity of that finding any further, and allow it to remain on record as a consequence of Tribunal's order as modified above subject ofcourse to the rights of the parties to remedies as are available under the law.

##. As a result of our decision relating to the order of Tribunal dated 30.11.1994, the notice under Section 154 issued by the Income Tax Officer on the basis of that finding also cannot survive. The same also is therefore quashed.

##. Since the order of Tribunal has been corrected by issuing writ of certiorari, the further examination or direction in respect of order of the Tribunal dated 30.11.1998 on rectification application has become

academic, we leave it at that.

##. The petition accordingly stands allowed and Rule is made absolute as above.

There shall be no order as to costs in this Special Civil Application.

(Rajesh Balia, J) (A.R. Dave, J)